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COURT OF CRIMINAL APPEALS
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IN THE
COURT OF CRIMINAL APPEALS
OF TEXAS
AUSTIN, TEXAS

SAUL RANULFO HERRERA RIOS,
Petitioner

VS.

THE STATE OF TEXAS,
Respondent

On discretionary review of a decision by the Fifth District Court of Appeals in cause no. 05-19-00297-CR

On appeal from cause no. F17-24112-P
from the 203rd Judicial District Court of
Dallas County, Texas

BRIEF OF PETITIONER SAUL RANULFO HERRERA RIOS

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Visiting Judge for 203rd Judicial District Court
Dallas County, Texas

Trial Judge for post-trial evidentiary hearing:

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TO THE HONORABLE COURT OF CRIMINAL APPEALS:

Petitioner, Saul Rudolfo Herrera Rios, by and through his attorney of record, respectfully submits this brief on discretionary review of the court of appeals' opinion.

STATEMENT OF THE CASE

Saul Ranulfo Herrera Rios was charged by indictment with Continuous Sexual Abuse of a child under the age of 14. (C.R. at 8). Mr. Rios was tried before the court on a plea of "not guilty". (II R.R.). The court found Mr. Rios guilty as charged and after hearing additional evidence, sentenced him to 35 years in the penitentiary. (C.R. at 38; III R.R. at 6, 29). A notice of appeal was timely filed. (C.R. at 41). This is an appeal from that judgment.

ISSUE PRESENTED

"[T]he decision of the Fifth District Court of Appeals to uphold his conviction holding to John[son] v. State, 72 S.W.3d 346, 347 (Tex. Crim. App.[2002]) is in conflict with other Court rulings [and] based on the circumstances of Rios' case the Court of Appeals should have held to State EX Rel Curry v. Carr, [847 S.W.2d] 561, 562 (Tex. Crim. App. 1992) and

reversed Rios' conviction and ordered that he be given a trial by jury as he asked for."

STATEMENT OF FACTS

Mr. Rios was charged by indictment with Continuous Sexual Abuse of N.R., a child under the age of 14, by penetration of the complainant's female sexual organ by the Defendant's finger and by contact between the hand of the Defendant and the genitals of the complainant with the intent to arouse and gratify the sexual desire of the Defendant. (C.R. at 8). Mr. Rios entered a plea of "not guilty" and was tried by the court. (II R.R. at 10). However, no written jury waiver was executed, nor did Mr. Rios waive a jury on the record in open court as required by Tex. Code Crim. Proc. art. 1.13.

N.R. told the court that when she was 7 and 8 years old, Mr. Rios, who was her father, touched her vagina with his hand and inserted his fingers into her vagina. (II R.R. at 75-79). This happened during a three-month period when her parents were separated, prior to divorcing. (II R.R. at 18). N.R. did not say anything until several years later. (II R.R. at 21).

Mr. Rios denied ever touching his daughter inappropriately and believed the allegations were motivated by his refusal to pay for N.R.'s quinceañera. (II R.R. at 99, III R.R. at 23).

The trial court found Mr. Rios guilty as charged and after hearing additional evidence, sentenced Mr. Rios to 35 years in the penitentiary. (III R.R. at 6, 29).

After filing a notice of appeal, the appeal was abated for an evidentiary hearing to determine if Mr. Rios had, in fact, waived a jury. (Order, Tex. App. – Dallas, September 9, 2019).

Diana Gonzales was a probation officer who conducted a pre-sentence investigation (PSI) on Mr. Rios. (I Supp. R.R. at 9). She said it was unusual to conduct a PSI on a defendant who was going to trial. (I Supp. R.R. at 11). Mr. Rios did not appear to understand why he was meeting with a probation officer. When Ms. Gonzales explained that it was usually done for an "open" plea, Mr. Rios told her he did not want to do an "open" plea. (I Supp. R.R. at 13). Neither Mr. Rios, nor Ms. Gonzales mentioned anything about a trial. (I Supp. R.R. at 13-15).

Mr. Rios, who spoke Spanish, testified through an interpreter. (I Supp. R.R. at 5). He told the court that he met with his attorney on his court dates. His attorney, who did not speak Spanish or have an interpreter present,

would hand him a blank pass-slip to sign. His attorney would then bring the pass-slip back to Mr. Rios with his next court date. Mr. Rios did not understand that the box checked on the pass-slips stated that the case was being set for a trial before the court. (I Supp. R.R. at 18, 27). Mr. Rios never said he wanted to waive a jury and was not requesting a trial with only a judge. He wanted a jury trial. His attorney told him his fee would be an additional $5000 for a jury trial. (I Supp. R.R. at 24). When he went to court for his trial, he thought it was just a hearing before the judge. (I Supp. R.R. at 19-20).

The trial prosecutor testified that the case was never set for a jury trial. The defense attorney had told her that he wanted to set it for a trial before the court. (II Supp. R.R. at 10). She had no recollection of a written jury waiver ever being signed. (II Supp. R.R. at 14).

The trial defense attorney testified that he believed that Mr. Rios wanted a trial before the court. He did not sign a written jury waiver prior to the trial because the trial judge was rushing them. (III Supp. R.R. at 9). He spoke to Mr. Rios with an interpreter before the trial. (III R.R. at 14).

The trial court then signed Findings of Fact and Conclusions of Law which had been drafted by the prosecutor. (II Supp. C.R. at 11). In the State's brief in the court of appeals, the State noted that these fact findings

contained several "typographical" errors which changed the substance of the findings[1]. (State's brief in the court of appeals at 15-16, n. 3, 4). Nevertheless, the trial court concluded that Petitioner had waived his right to a trial by jury, despite the absence of a written or oral waiver in the record. (II Supp. C.R. at 11-14).

SUMMARY OF THE ARGUMENT

This Court should not follow Johnson v. State, 72 S.W.3d 346 (Tex. Crim. App. 2002), as the court of appeals did, because Johnson never alleged that he did not waive a jury trial. Rios claims that he never waived a jury trial. Therefore, this is not a case alleging a mere statutory violation for failure to comply with Tex. Code Crim. Proc. art. 1.13. This case involves the total lack of a jury trial waiver, an error of constitutional magnitude.

ARGUMENT

"[T]he decision of the Fifth District Court of Appeals to uphold his conviction holding to John[son] v. State, 72 S.W.3d 346, 347 (Tex. Crim. App.[2002]) is in conflict with other Court rulings [and] based on the

[1] Finding No. 15 – "Appellant testified that the did not ask his trial counsel to object to the trial before the court", should have read "Appellant testified that he did ask…." (State's brief in court of appeals at n. 3.

circumstances of Rios' case the Court of Appeals should have held to State EX Rel Curry v. Carr, [847 S.W.2d] 561, 562 (Tex. Crim. App. 1992) and reversed Rios' conviction and ordered that he be given a trial by jury as he asked for."

On direct appeal, Rios complained that there was no written waiver of a jury trial as required by Tex. Code Crim. Proc. art. 1.13; he did not, in fact, waive his right to a jury trial; and the form judgment incorrectly recited that he had waived his right to a jury trial. In affirming his conviction, the court of appeals concluded that Rios did in fact waive his right to a jury trial and he was not harmed by the failure to comply with art. 1.13, relying on this Court's opinion in Johnson v. State, 72 S.W.3d 346 (Tex. Crim. App. 2002).

However, the court's reliance on Johnson is misplaced. Johnson never claimed that he did not waive his right to a jury trial. He complained only of the court's failure to comply with art. 1.13 and the only issue before the court was the determination of harm for this statutory violation. Johnson at 347 ("The issue in this case is whether the failure to obtain a written jury waiver is harmful."). Unlike Johnson, Rios claimed that not only was art.

Finding No. 24 – "This Court finds Appellant's testimony that he was not aware of his right to a jury trial to not be credible", the State asserts that this finding was a typographical error because it was not supported

1.13 violated, but he did not, in fact, expressly waive his right to a jury trial. Relying on the trial court's findings, the court of appeals concluded that Rios had, in fact, waived his right to a jury trial. The court noted that Rios had signed several pass-slips which had a box checked for "trial before the court" and the fact that Rios never objected to the lack of a jury at any time in his trial before the court. Rios v. State, 626 S.W.3d 408, 414 (Tex. App. – Dallas, June 1, 2021, pet. granted).

The right to a jury trial is guaranteed by both the United States Constitution and the Texas Constitution. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury."); TEX. CONST. art. 1, § 15 ("The right of trial by jury shall remain inviolate.") "As a matter of federal constitutional law, the State must establish, on the record, a defendant's express, knowing, and intelligent waiver of jury trial." Hobbs. v. State, 298 S.W.3d 193, 197 (Tex. Crim. App. 2009) (citing Guillett v. State, 677 S.W.2d 46, 49 (Tex. Crim. App. 1984). A defendant's mere acquiescence in proceeding to trial without a jury does not constitute an express waiver. Ex parte Lyles, 891 S.W.2d 960, 962 (Tex. Crim. App. 1995). A knowing waiver is an intentional relinquishment of a known right. For a waiver to be valid, the

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by the record". (State's brief in the court of appeals at n. 4).

record must show that it was voluntarily and knowingly made. Robles v. State, 577 S.W.2d 699, 703 (Tex. Crim. App. 1979). A silent record cannot support a presumption a defendant affirmatively and knowingly waived the right to a trial by jury. Guillett, 677 S.W.2d at 49. Breazeale v. State, 683 S.W.2d 446, 450 (Tex. Crim. App. 1984) (op. on reh'g).

Tex. Code Crim. Proc. art. 1.13 is the statutory mechanism for insuring compliance with this inviolate constitutional right. It provides, in relevant part, the defendant "shall have the right, upon entering a plea, to waive the right of trial by jury, conditioned, however, that…the waiver must be made in person by the defendant in writing in open court with the consent and approval of the court, and the attorney representing the state". Tex. Code Crim. Proc. art. 1.13(a). If the state fails to agree to this waiver, the court does not have the authority to act as factfinder and must empanel a jury. State ex rel. Curry v. Carr, 847 S.W.2d (Tex. Crim. App. 1992).

In this case, there is no dispute that Art. 1.13 was not complied with. Nevertheless, the trial court found that Rios had, in fact, waived his right to a jury. (II Supp. C.R. at 13). Relying on the trial court's finding, the Court of Appeals also agreed that Rios had waived his right to a jury trial. (Rios, 626 S.W.3d at 416-17).

Generally, a trial court's findings of fact are afforded almost total deference, especially when the findings are based on determinations of credibility. Guzman v. State, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997). The same deferential standard applies when "reviewing a trial court's application of law to the facts or to mixed questions of law and fact, especially when the findings are based on credibility and are supported by the record." Miller v. State, 393 S.W.3d 255, 262-63 (Tex. Crim. App. 2012). Legal conclusions are reviewed *de novo* unless the trial court's findings that are supported by the record are dispositive. Miller, 393 S.W.3d at 263.

In this case, the trial court's findings should not be afforded total deference. The findings in this case were prepared by the state and are even entitled "State's Amended Proposed Findings of Fact and Conclusions of Law." (II Supp. C.R. at 11). The trial court did not even bother to change the heading before signing these findings. Then in the State's brief on direct appeal, the State admits that at least two findings were wrong and not supported by the record. Finding No. 15 stated that "Appellant testified that he did not ask his trial counsel to object to the trial before the court." The trial court signed off on this finding as written. However, in the State's brief in the court of appeals, the State admitted that this finding contained a

typographical error in stating that Appellant "did **not** ask", because Rios had testified that he **did** ask his attorney to object. (State's brief on direct appeal at 15, n. 3). Similarly, Finding No. 24 stated, "This Court finds Appellant's testimony that he was not aware of his right to a jury trial to not be credible." (II Supp. C.R. at 13). The State's brief called this a "typographical error", noting that Appellant was never asked whether he was aware of his right to a jury trial. (State's brief on direct appeal at 16, n. 4). It really is not clear why the State calls this a "typographical error" because, unlike the previous erroneous finding, this one does not involve the improper insertion or deletion of a critical word. This one is just flat out not supported by the record. And critically, this one involves a finding purportedly based on a credibility determination. These errors, admitted by the State, should cause any reviewing court to give the trial court's findings closer scrutiny and certainly to withhold "total deference".

The boilerplate form judgment in this case which reflects that "Defendant waived the right of trial by jury….", (C.R. at 39), is likewise, simply not supported by the record. The parties stipulated that these forms are auto-generated by checking a certain box. (I Supp. R.R. at 32). The judgment was also not signed by the same judge that presided over the trail. (C.R. at 39). The State even disputed the accuracy of another recitation in

this form judgment in its cross-point in the court of appeals. The form judgment reflected that the 35- year sentence in this case was pursuant to a plea bargain agreement. That was not the case. This point was sustained by the court of appeals and the judgment was modified. (Rios, 626 S.W.3d at 417). Likewise, the boilerplate recitation about a jury waiver carries little, if any, weight when examining the record as a whole.

As pointed out in the Concurrence Dubitante, there were numerous indicators in the record that do not support an express waiver of Rios' right to a jury trial. Rios was a native Spanish-speaker and his attorney did not speak Spanish. The record is clear that Rios was confused by many aspects of the court proceedings. For instance, when Rios showed up for a pre-sentence interview with probation, Rios had no idea what the purpose of the interview was; he testified that his attorney just told him to show up for an appointment. (I Supp. R.R. at 12). Additionally, the concurring opinion notes that Rios testified:

- He did not understand he had the right to a jury trial but told his attorney he wanted a jury trial;
- His counsel requested, but may not have received, an additional fee to compensate for the extra work of a jury trial;
- He did not think he had ever signed any paperwork indicating he wanted a trial before the court rather than a jury;
- When he signed the pass slips they were blank;

- He did not understand the meaning of the checks marked on the pass slips for a bench trail – shown to him during the hearing regarding whether he waived his right to a jury trial but apparently not after his attorney had checked that box after Rios signed the blank forms – because they were written in English and his attorney informed him only that each was to get a new trial date;
- Only once when he met with is attorney, including the times he signed pass slips, did he have an interpreter;
- At only one of the four pretrial settings did Rios's English-speaking attorney bring an interpreter;
- The pretrial hearings were cursory and no important issues were ever addressed at any of them;
- On the day of his trial he though he was in court for another hearing;
- Neither the judge nor his attorney informed him he was in court for his trial on the day of his trial;
- The trial judge did not admonish him of his right to a jury trial before commencing the trial;
- He instructed his counsel to object to proceeding on the morning of his trial without a jury;
- He wanted a trial before a jury and never consented to a trial before the court; and
- His attorney wanted another $5,000 for a jury trial.

Rios, 626 S.W.3d at 419) (Burns, J. concurrence dubitante).

While the signed pass slips and the lack of any objection during or immediately after the trial are certainly relevant factors in considering the harm caused by the failure to comply with Tex. Code Crim. Proc. art. 1.13, they are not an express waiver on the record. There simply was none. At best, there was mere acquiescence in proceeding to a trial without a jury. A court's failure to obtain any jury waiver at all is "structural" constitutional

error that affects the very framework of the underlying trial. Davidson v. State, 225 S.W.3d 807, 811 (Tex. App. – Fort Worth 2007, no pet.) (citing Loveless v. State, 21 S.W.3d 582, 584 (Tex. App. – Dallas 2000, pet. ref'd), *abrogated on other grounds by Johnson v. State*, 72 S.W.3d 346, 348 (Tex. Crim. App. 2002). If the State's failure to affirmatively acquiesce to a trial before the court divests the trial court of authority to conduct such a trial, as held in State ex rel. Curry v. Carr, 847 S.W.2d (Tex. Crim. App. 1992), the failure to obtain an express waiver by the defendant should have the same result.

PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, there being reversible error appearing in the record of the trial of this case, the Petitioner moves the Court to reverse the opinion of the court of appeals and remand the case to the trial court for further proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief was served on Stacey M. Soule, State Prosecuting Attorney, P.O. Box 13046, Austin, Texas 78701, by service through the court's electronic filing system to information@spa.texas.gov and on Marisa Elmore, Assistant District Attorney, Dallas County, 133 N. Riverfront Blvd., LB 19, Dallas, Texas 75207, by service through the court's electronic filing system to marisa.elmore@dallascounty.org on January 21, 2022.

Attorney for Petitioner

CERTIFICATE OF COMPLIANCE WITH RULE 9.4

I hereby certify that the foregoing Brief contains 3,649 words.

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